

Neutral Citation No [2019] ECC Yor 3

In the Diocese of York

In the Consistory Court

The Parish of Scalby

The Church of St Laurence

1. By a Petition dated 25th June 2018 the petitioners, the Reverend Lynn Hellmuth, Vicar, and Mrs Sally MacIntyre, Churchwarden, sought a faculty to:
 - i. Set aside an area of the "Glebe Field" for the burial of cremated remains. (A map was attached to the petition setting out the proposed area which is cross hatched and to the south of the footpath marked in pencil on the map.)
 - ii. Vary the Churchyard Memorial Rules 2013 with regard to the cremated remains area in the Glebe Field to permit the erection of upright memorials, and horizontal memorials not flush with the ground, for cremated remains that have already been interred there. (Photographs were enclosed with the petition showing the current memorials.)
 - iii. Vary the Churchyard Memorial Rules 2013 with regard to the cremated remains area in the Glebe Field to permit, going forward, the erection of upright memorials and horizontal memorials not flush with the ground.
2. Attached to the petition was a letter from PCC explaining the reasons why this petition had been presented. I summarise it as follows: The Glebe Field was consecrated as an extension to the churchyard in September 1993. It has been used for the burial of cremated remains since 2001. Throughout its use for the burial of such remains, upright memorials and horizontal memorials which were not flush with the ground, and some being of the desktop style, have been permitted. This happened because the PCC was not aware of the restrictions imposed by the Rules. Having been alerted to the rules they wish not only to regularise what has taken place, but to continue with the same practice. They say that "it would cause great dismay and bewilderment in the congregation and wider community if such memorials were no longer permitted after 18 years or so of them having been erected. The PCC anticipates there will be significant disappointment and some hostility in the parish if the regulations for memorials for cremated remains are suddenly enforced after such an extended time when they have not been applied." They point out that "the sextons are managing the upkeep of this area well, despite concerns expressed in the regulations that the management of the ground can be difficult when there are upright memorials." They have considered applying for faculty to permit upright and desktop memorials "to finish off a part of the cremated remains area". However the practical layout of the Glebe Field does not lend itself to this approach. They say that in this country churchyard setting, the small number of flat stones they have which are flush with the ground have grass encroaching over them more readily than the other memorials, and that leaves gather and moss grows

creating a potential slip hazard. They say that local historians have commented that information about those commemorated is lost more quickly on such stones. They recognise that what they asked for is an exceptional decision, but argue that “given the length of time the regulations have not been observed, and the way the memorials already in the cremated remains area are laid out, it is pastorally and practically the right way forward for this part of Scalby churchyard.”

3. Their proposal was initially considered by the DAC at its meeting on 7 July 2018. The Committee had no issues about the setting aside of the proposed area for the interment of cremated remains. What did concern them were the proposals in relation to the current and potential future memorials not complying with the Churchyard Memorial Rules 2013. The Committee’s concerns were subsequently drawn to the attention of the petitioners. They were told that the members had agreed that they could not retrospectively approve a breach of the Rules and past non-compliance was no excuse for continued non-compliance. They were told that such an argument is one the DAC hears repeatedly and that Scalby is not the first to plead “exceptionality”.
4. The PCC considered the response of the DAC at its meeting on 6 September 2018. It resolved unanimously to petition me to vary the Churchyard Rules in their case.
5. The matter was then considered again by the DAC at its meeting on 17 October 2018. It resolved to “not recommend” the proposals.
6. When the matter was thereafter referred to me I considered that before reaching a decision I should visit and inspect the churchyard. That I was able to do on 22 January 2019. I was accompanied on my inspection by the two petitioners and in addition by Mrs Lesley Newton, the PCC secretary, who proved to have a very extensive knowledge of the history of the church and the churchyard. I am grateful to all three of them for their assistance in explaining matters to me.
7. The church itself dates back to 1130, having been rebuilt in 1180, with subsequent additions. Of note, the tower was added in 1683 and just outside the porch is a grade I sundial dating from 1690. The church is set in the conservation area of Scalby village to the north-east of Scarborough, the village being on the edge of the North York Moors. It is described as a rural/urban community.
8. The churchyard wraps around the church on all sides. North-west of the churchyard is a large field described as “the Glebe Field”, which is separated from the churchyard by quite a steep slope with a stream at its foot. The field then slopes westward and upward away from the stream. It was this field which was consecrated as an extension to the churchyard in 1993. By then the churchyard was full. However, as is usually the case, there were some spaces where it would not be possible to bury a full coffin but where cremated remains could be interred. From 1975 that is what had been happening. The pattern is evident as you walk through the churchyard. It would seem that the first such interments took place along the western edge of the churchyard between the last row of coffin graves and the fence

bordering the woodland at the top of the slope down to the Glebe Field. Most of these interments have small upright memorials hard up against the fence. They date from 1975. There are four other discrete areas where such burials have taken place. One can discern that those responsible for arranging burials have identified areas where it would be possible to “fit in” rows of cremated remains. As one follows the path around the tower and to the north there is an area to the left of that path where a number of burials of cremated remains have taken place. There is also an area in what was clearly an extension to the original churchyard which lies to the north of the church. Again space has been used where it would not have been possible to put coffins, namely close to the wall along the south and east sides of this extension area. What has happened here is that there are two rows of interments; the row closer to the path has for the most part flat memorials, whereas the row closer to the wall has in most cases a memorial tablet which has been put into or onto the wall itself. Both these areas were used during the 1990s. As you climb from Church Hill to the front porch of the church, there is a narrow strip of ground to the left of the path between the path and the retaining churchyard wall. There are no coffin burials or other memorials on that strip, but there is evidence of the burial of several sets of cremated remains each marked with a flat stone memorial. Not many however are flush with the surrounding ground. From the dates on these memorials it appears that this area was being used at the turn of the century.

9. The final area to be used in this way has been the Glebe Field. The earliest memorial for cremated remains is for a burial in 2001, when clearly there were no other identifiable spaces in the churchyard where such remains could be “squeezed in”. As one descends into the field the path goes forward from the fence and then turns round to the left. It is in the area to the left of that path that cremated remains have been interred. There are now five rows of memorials. Each row contains between 10 and 15 memorials. The first 3 rows face the fence and the woodland. That was probably because this was seen as a natural extension of the churchyard above and beyond the fence, and they face in the same direction as the memorials in that part of the churchyard. It would seem that somebody then decided that it would be more sensible if these memorials faced the path and the rest of the field. I was told that this Glebe Field has become quite a popular place for people to visit. In the summer those coming to visit and/or to tend graves sometimes bring picnics which they enjoy while sitting on the sloping field. There are now some benches there. It clearly makes much more sense that the memorials should face in that direction, and so the more recently erected ones now do.
10. I was told that no one now has any memory of how it came about that decisions were made as to what memorials could be allowed in these various parts of the churchyard. But the logic of the development of the useable space seems clear, and I can well understand, that if as I believe, the first York Diocesan Churchyard Memorial Rules were not promulgated until 1992, then the practice in this churchyard which resulted in the situation I have described, was established long before those Rules came into being.

11. It is unclear why between 1992 and the arrival of the present incumbent a year ago, no one has ever raised an issue about the fact that the practice in this churchyard has always been very different from that set out in the Rules.
12. However, the question that faces me is whether this practice should be allowed to continue and be recognised, by my allowing a different set of regulations from the standard ones, to be the rule hereafter at Scalby.
13. The test that I must apply is the test that all Chancellors must apply to all petitions, namely whether the petitioners have made out a case for what they propose. The case here however is rather unusual as the petitioners are not seeking to alter the status quo, rather they wish to maintain it in the face of Rules that have been promulgated long after that status quo was established.
14. The position concerning the interment and commemoration of cremated remains has evolved over the years as cremation has become increasingly common. Cremation was declared lawful in the UK as recently as 1884. That came about when a Dr Price was tried at the South Glamorgan Assizes following upon his having attempted to cremate his deceased 5 month old son. Stephen J directed an acquittal pronouncing that cremation was lawful provided that no nuisance to others is caused in the process. Thereafter the interest that had been developing in cremation took off, promoted in part by the activity of the Cremation Society. Cremations began to take place, although initially few in number. In 1902 the Cremation Act 1902 was passed and in 1903 secondary legislation pursuant to the 1902 Act was enacted to regulate crematoria and the practice of cremation including the disposal of ashes.
15. The church was to an extent slow to adopt cremation. Encouragement came in 1910 when Westminster Abbey decided that the bodies of those destined to repose in the Abbey must first be cremated. The cremations of Archbishop Temple in 1944 and Archbishop Lang in 1946 undoubtedly had an impact upon perceptions of churchgoing people as to the acceptability of cremation. It was not however until 1963 that the Pope decreed that cremation was acceptable from a Christian standpoint. The position today is that 75% of those who die in the UK are cremated.
16. How the church handled the marking of those remains that were interred within churchyards also developed during this period. It would appear that initially Books of Remembrance was the preferred way to record the names of those whose ashes were interred in the churchyard. The 3rd edition of the *Churchyard Handbook* (1988) said at page 111:

“in recent years the Church has garnered the fruits of her teaching that the churchyard should be the final resting place of the remains of her departed members... Just as a stone in the churchyard marks the burial of the body so mourners have desired to mark, in the same way, the place where ashes are buried. This satisfies the instinctive desire to honour the precise spot ... Sadly, the Church can be said to have become the victim of its own success. Many churchyards are experiencing the problem of the proliferation of numerous small tablets laid on the ground adjacent to its pathways and walls. This can create a sizeable

paved area quite alien to the nature of the traditional churchyard. In 1976 we indicated the need for further experiment but, despite many attempts no generally applicable solution has been found ... There is no doubt that the most practical way for the upkeep of the churchyard is to inter ashes in a marked out area without any memorial over the spot and for the names to be recorded in a memorial book or on a commemorative role ... In view of people's strong if often unexpressed desire for a locality, however, this is sometimes pastorally difficult to implement. If tablets on the turf have not proved successful, one alternative seems to be a more formal arrangement of tablets in paths or alongside them... or in specially prepared areas expertly laid out by a landscape architect or someone experienced in various aspects of garden design ... As an entirely new approach, commemorative tablets, however or wherever located, might be leased, and removed after – say – 25 years or whatever period was agreed.”

17. Goodman Ch cited that passage in his judgment in *Re: St. Edmund K. M., West Kingsdown* (Unreported 24 February 1989). The parish had petitioned for a faculty to permit the setting aside of an area adjacent to the east wall of the church for the interment of cremated remains and for individual 10” square stone plaques placed in the centre of each plot should that be wished. The DAC had advised against it, preferring either a memorial book in the church or a single plaque. The Chancellor adjourned the matter for the petitioners to consider again the DAC proposal or the possibility of selecting a different site in the churchyard for the interment of cremated remains.
18. Coningsby Ch dealing with a case in the diocese of Peterborough – *Re St Peter, Weston Favell* (unreported 25 July 1990) was faced with a church where the previous incumbent had allowed some relatives to place plaques over cremated remains or beside a bush or shrub they had planted but had refused others the same facility. The new incumbent wish to remove the existing 16 plaques and put them together in one place in the churchyard, refuse any future applications for similar memorials and record such burials in a book to be kept in the South Porch. In giving judgment the Chancellor referred to his Diocesan Churchyard Regulations. He said that in delegating the giving of permission to incumbents to permit memorials falling within the parameters of the Regulations “it is made quite clear that this applies only to memorials over graves, so that the delegation does not apply at all in respect of memorials over cremated remains. In such cases the incumbent has no delegated authority at all and any application for a memorial, however small, must be made to the Chancellor (unless the Chancellor has already by a previous Faculty approved the setting aside of an area for cremated remains and has expressly in that Faculty given permission for small memorial plaques to placed within that area). He granted the Faculty and further directed that “no further commemorative plaques for the interment of cremated remains will be placed in the churchyard.”
19. G.H. Newsom's *Faculty Jurisdiction of the Church of England* (1993) when dealing with reservation of areas for the burial of cremated remains said at p.170 “The court should make regulations in the faculty as to the way of marking the places where ashes are buried: a great number of small plaques is not an embellishment to the churchyard and it is usually desirable to arrange that individual burials of ashes within the reserved plot shall not be marked at all, but that there shall either be a collective monument in the burial plot or a book of remembrance in the church, on

or in which individual names can be marked as burials occur.” In a footnote he added not a reference to leasing, but a suggestion that a condition of permitting memorial stones might be that they be removed by the PCC after, say, two decades.

20. On 16 January 1995 in another unreported case – *Re: St John the Baptist, Sheffield - Aglionby Ch* dealt with a petition concerning four matters, the fourth and only uncontentious one was to “create a rectangular area immediately north of the ruined tower to be set aside for the burial of cremated remains, the area being arranged in a grid pattern with intercepting grass paths and memorial stones being placed on such burials, the stone being of a regulation size and made only of Portland stone.” In granting the faculty he said that the “stone memorials must be level with the ground to allow for easy maintenance”.
21. Also in 1995 Briden Ch dealt with the case of *Re: St Quiricus and St Julietta, Tickenham* (unreported 27 January 1995). In that case what was described as a “memorial garden”, a term sometimes applied to the area set aside for cremated remains, had been laid out adjacent to the churchyard wall. It had been allowed by faculty in 1979 and extended in 1982, but neither faculty could be found and so what provision, if any, had been made for the commemoration of those whose ashes lay in the garden could not be ascertained. What had happened was that some 32 stone plaques had been inserted into the wall. This had been done by extracting some of the stonework and setting the plaques in the wall so that their faces were level with the surrounding surface. There was concern that this practice was threatening the stability of the wall. The adjoining property owner sought a faculty directing that the practice cease forthwith. Balancing concerns about the stability of the wall with concerns for the pastoral implications of suddenly stopping the practice, the Chancellor decided to permit a further six plaques to complete the present row. What would happen thereafter was not addressed in the judgment.
22. Meanwhile in September 1992 in this diocese Coningsby Ch had issued his first “Churchyard Regulations & Faculty Matters”. This was said to be “A supplement to the Diocesan Manual containing the Chancellor’s Regulations relating to Churchyards, and other matters, together with notes of general information on Faculty Jurisdiction”. It contained the delegated scheme for incumbents to allow memorials falling within the Rules. It refers specifically to “graves”. No doubt he had his Peterborough judgment [*supra*] in mind in that respect. A separate section dealt with “commemoration after cremation”. That provided that “An incumbent may grant permission for commemoration in a Book of Remembrance of a person whose remains are cremated. The Book of Remembrance shall be kept in church.” There was no provision for any other form of memorial in relation to cremated remains.
23. In 1999 that document was revised and reissued. The Churchyard Memorial Regulations were now to be known as the Churchyard Memorial Rules. Specific provision was made in these regulations for “memorials marking the burial of cremated remains”. They provided that

“In an area set aside for the burial of cremated remains, a stone tablet, no larger than 18” x 18” may be laid flush with the ground. This will not be permitted if the faculty which authorised the setting aside of the area does not permit individual tablets.

Where cremated remains are interred individually in an otherwise underused area of the churchyard the internment may be marked by a stone tablet laid flush to the ground measuring not more than 18” x 18”. Such tablet may be rectangular, round or oval in shape, but not triangular. It may also include an integral flower holder.

Where cremated remains are buried in the churchyard the Minister may also grant permission for the following forms of commemoration:–

- A An inscription on a single communal memorial in the churchyard (where such a memorial exists pursuant to a previous faculty).
- B A suitable addition to an existing stone relating to a close relative.”

There were other provisions about the manner of the application to be made and fees.

24. That development clearly reflected the changes that had been taking place across the country, and that I have observed in the cases and other materials I have referred to. First the practice of setting aside areas for cremated remains and second the allowing of memorial tablets provided they are flush to the ground. My understanding is that many chancellors had by this time in 1999 issued similar sets of regulations.

25. A further version was revised and reissued by Coningsby Ch in 2005. It included a specific prohibition on ministers permitting upright memorials to mark the burial of cremated remains.

26. When I revised and reissued the Regulations in 2009 and then again in 2013 and most recently in 2018, I attempted to set out the rationale behind the Rules. I also made clear that there would be cases when an application might well be permitted for an upright memorial. The relevant Rules in 2009 were

- 5.5.1 No upright memorial may be permitted by the minister in charge of the churchyard under these Regulations to mark the burial of cremated remains.
- 5.5.2 A faculty is always required to introduce an upright memorial to mark the burial of cremated remains. The Chancellor has indicated an unwillingness to authorize upright memorials to mark cremated remains in an area already set aside by faculty for cremated remains because such a memorial is out of proportion to the size of each plot and may cause a tripping hazard. Management of the ground between upright memorials in narrow rows can be difficult. In churchyards where there is no area set aside by faculty for cremated remains the Chancellor will consider a petition on its merits which requests the introduction of an upright memorial for cremated remains in a plot which is not suitable for a coffin – perhaps close to the perimeter wall, hedge or fence of the churchyard or some other discreet position in the churchyard where the dimensions available are not suitable for a coffin burial.

27. However that rationale recognises that there will be exceptions. Though what is said applies to individual memorials in isolated positions it may also apply by way of example to a whole row against a fence or wall. That is exactly what has happened

here. It seems to me that it applies to all the areas apart from the Glebe Field that have been utilised for the interment of cremated remains. It therefore seems to me that it is highly likely that if an application had been made for permission to place upright stones beside these remains then it would have been granted. I note also that the first row that was used in 1975 is behind a row of kerbed graves. The row that is there is considerably easier to manage than the kerbed rows in front of it. Similar things can be said about the ease of managing the other areas so utilised, apart from the Glebe Field.

28. So, I turn now to deal with the argument of the petitioners that they should be allowed to follow the now well-established practice in this churchyard; that they are fortunate in employing two sextons, one for a whole day a week and one for one and half days per week; and that they appreciate that their proposal involves more work and so will have a cost, but it is one that they consider is worth paying.
29. My approach to this question is of course very different from where there has been compliance with the Regulations by the majority and someone wishes an exception. Such a case in this diocese was *Re: St Helen Welton Neutral* Citation Number: [2017] ECC Yor 2. In that case I had no hesitation in upholding the incumbent and PCC who had been faithfully applying the regulations and who wished the removal of a memorial that had been introduced without permission and in breach of the regulations. It is also different from the case where there has been mixed compliance in the past, but a new incumbent wishes to comply and there is some resistance from some individuals. There the views of the majority wishing to apply and enforce the Regulations will have my support. But this is different. There is a long history that has established a practice in this churchyard. That practice has been overtaken by rules that have sought to provide a uniformity of good practice to enhance churchyards where the practice of individualisation of commemoration needs clear guidance.
30. I am satisfied that there is no good reason in law why the clear and settled views of this church family should not be allowed to prevail. They have made out their case that these memorials whether of an upright or a desktop style do not create difficulty for them in the management of the churchyard. For my own part I consider that the way they are being arranged in the Glebe Field will be much more attractive in this very large space than would be a "a sizeable paved area". They are of course fortunate in being able to employ their two sextons, but I have no reason to think that that will not continue to be the case.
31. I am satisfied that the petitioners have made out a case in the particular history and circumstances of this churchyard, for the practice that has been in place for about 30 years without any difficulty arising, to be allowed to continue, including in the Glebe Field extension.
32. I shall therefore direct that a faculty pass the seal

- a. To set aside an area of the “Glebe Field” for the interment of cremated remains, being the area cross hatched on the plan attached to the petition.
- b. To permit the incumbent responsible for arranging burials in this churchyard to be permitted to grant permission for the introduction of memorials marking the burial of cremated remains otherwise than in accordance with the Diocesan Churchyard Memorial Rules 2018 in so far as s/he may permit:
 - i. Upright memorials which should be no less than 20 inches and no more than 24 inches in height; no more than 18 inches in width; and no thinner than 1.5 inches.
 - ii. Upright memorials to stand on a base or plinth above the foundation, providing that it is an integral part of the design and does not project more than 8 inches in front of the headstone.
 - iii. A built in receptacle for flowers to form part of the memorial in which case this should be flush with the top of the base.
 - iv. A horizontal tablet which should be no more than 18 inches by 18 inches in size with a maximum height above the ground of 4 inches.
 - v. All memorials so allowed shall comply with regulations 4.6 to 4.12 inclusive and 4.14 of the Churchyard Memorial Rules 2019, as to materials, shape, inscriptions, lettering, likeness of the deceased, etchings, trademarks and QR codes.
- c. And so far as it may be necessary I will grant a confirmatory faculty for the various upright and other memorials erected throughout this churchyard since the relevant Regulations came into being which do not comply with the provisions as to style, size or any other material particular.

33. This faculty will be granted until further order.

Canon Peter Collier QC
Chancellor of the Diocese of York

The Conversion of Paul 2019